

Supreme Court, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. **75-1730**

TWO TRACTS OF LAND CONTAINING A
TOTAL OF 146.4 ACRES, MORE OR LESS,
IN LOUDON COUNTY, TENNESSEE

ROBERT G. DAVIS,

VIVA LEE DAVIS, His Wife,

THE FEDERAL LAND BANK OF LOUIS-
VILLE, a Corporation,

E. V. LANDERS, Trustee - - - - Petitioners

VERSUS

UNITED STATES OF AMERICA, Upon the
Relations and for the Use of the TENNES-
SEE VALLEY AUTHORITY - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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I N D E X

| | PAGE |
|---|-------|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Constitutional Provisions and Statutes Involved.... | 2- 5 |
| Question Presented | 5 |
| Statement | 5- 7 |
| Reasons for Granting This Writ..... | 7-12 |
| Conclusion | 13 |
| Appendix | 15-24 |
| Opinion of United States Court of Appeals for the Sixth Circuit, Filed April 6, 1976..... | 15-19 |
| Order of United States District Court granting judgment on the pleadings to Respondent dated June 26, 1974..... | 20-21 |
| Complaint filed in United States District Court.... | 22-24 |

CITATIONS

Cases:

| | PAGE |
|--|-------------|
| Brown v. United States, 263 U. S. 87, 68 L. Ed. 171 (1923) | 7, 8, 10-12 |
| United States v. Welch, 327 U. S. 545, 90 L. Ed. 209 (1946) | 5, 7, 8-9 |

Constitutional Provisions and Statutes:

| | |
|---|------|
| United States Constitution, V Amendment | 2 |
| 16 USC Sec. 831c(h) | 3 |
| 16 USC Sec. 831u | 3- 4 |
| 16 USC Sec. 831x | 4- 5 |

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

TWO TRACTS OF LAND CONTAINING A TOTAL
OF 146.4 ACRES, MORE OR LESS, IN LOUDON
COUNTY, TENNESSEE

ROBERT G. DAVIS,
VIVA LEE DAVIS, His Wife,
THE FEDERAL LAND BANK OF LOUISVILLE,
a Corporation,
E. V. LANDERS, Trustee - - - - *Petitioners*

v.

UNITED STATES OF AMERICA, Upon the Re-
lations and for the Use of the TENNESSEE
VALLEY AUTHORITY - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The petitioners herein, pray that a writ of cer-
tiorari issue to review the judgment of the United
States Court of Appeals for the Sixth Circuit entered
in the above entitled case (its case number 75-1495)
on April 6, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in the Appendix hereto, *infra*, pages 15-19. The Order and Judgment of the United States District Court for the Eastern District of Tennessee, Northern Division, is printed in the Appendix hereto, *infra*, pages 20-21. The Complaint filed in the United States District Court, Eastern District of Tennessee, Northern Division, is printed in the Appendix hereto, *infra*, pages 22-24.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 6, 1976. The jurisdiction of the court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

16 U.S.C. Sec. 831c:

Except as otherwise specifically provided in this chapter, the Corporation—

* * * * *

(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this chapter. (i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this chapter, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all condemnation proceedings: PROVIDED, that nothing contained herein or elsewhere in this chapter shall be construed to deprive the Corporation of the rights conferred by sections 258a-258e of Title 40.

* * * * *

16 U.S.C. Sec. 831u:

Surveys: cooperation with States and other agencies

To aid further the proper use, conservation, and development of the natural resources of the

Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this chapter, and to provide for the general welfare of the citizens of said areas, the President is authorized, by such means or methods as he may deem proper within the limits of appropriations made therefor by Congress, to make such surveys of and general plans for said Tennessee basin and adjoining territory as may be useful to the Congress and to the several States in guiding and controlling the extent, sequence, and nature of development that may be equitably and economically advanced through the expenditure of public funds or through the guidance or control of public authority, all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas; and the President is further authorized in making said surveys and plans to cooperate with the States affected thereby, or subdivisions or agencies of such States, or with cooperative of other organizations, and to make such studies, experiments, or demonstrations as may be necessary and suitable to that end.

16 U.S.C. Sec. 813x:

Condemnation Proceedings: institution by corporation; venue

The Corporation may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements, or rights of way which in the opinion of the Corporation, are necessary to carry out the provisions of this chapter. The proceedings shall be instituted in the United States

district court for the district in which the land, easement, right of way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America.

QUESTION PRESENTED

Is the case of *U. S. Ex Rel TVA v. Welch*, 327 U. S. 546 (1946), authority for TVA to take private lands by way of condemnation for the express purpose of developing these lands to sell them to industries at an estimated profit of Ten Million Dollars where no problems are created by the erection of a dam relative to the land proposed to be condemned?

STATEMENT

The petitioners are land owners whose property the respondent took in condemnation proceedings in the United States District Court for the Eastern District of Tennessee, Northern Division, at Knoxville for the purpose of constructing a model city called Timberlake.

The District Court's jurisdiction rests upon the respondent's authority to condemn which is stated in 16 USC, Sections 831C(h), 831C(i) and 831X. The respondent contended that even though it admitted that the construction, operation and maintenance of Tellico Dam and Reservoir for the purpose of flood

control, power production and recreation would be relatively *insignificant* that it had authority to condemn the property for the purpose of reselling industrial sites in order to change the area from recreational and farming to industrial and to return the profit from the sale of the petitioners' land to the treasury to help defray the costs of the dam, inasmuch as Congress had appropriated the money and the administrative board of the respondent determined that the project was for the good of the general welfare of the people in that area. The petitioners raised legal objections to the taking, contending that the taking of their land to resell same at a profit to aid private commerce was not a public purpose; and in the alternative, that the area involved already contained a number of large industrial sites; that in the area involved 75 percent of the families own their own home and raise much of the food that they eat; that there was no unemployment and that every individual capable of doing work could find work in the area; that the agricultural economy was extremely good in the area; and the public health and emotional stability of the people is far above the industrial areas of Tennessee. The petitioners also showed that TVA officials publicly stated that in the Tellico project they were attempting to meet the criticism of the United States Chamber of Commerce that the TVA people were not paying for the dams and they worked out this scheme to buy private lands adjoining the reservoir and sell them at a profit to private individuals for the purpose of defraying part of the costs of the construction of the dam. Petitioners

contended that the above actions were not based upon reasoned principle and that the taking was not for a public purpose.

REASONS FOR GRANTING THE WRIT

This Court had occasion to consider the question of TVA's statutory authority to condemn in *U. S. v. Welch*, 327 U. S. 545 (1946). In that case the Fontana Dam Reservoir had flooded a roadway to an island containing 45,000 acres and it would have been highly impractical and extremely expensive to build a bridge and roads to the few residents left in the area. Both the State of North Carolina, the County involved, and the National Park Service all agreed that TVA should purchase the land in the island area as a practical solution to the problem created by the flooding of the roadway to the island by TVA. In fact, TVA was subject to a suit by the land owners by way of "reverse" condemnation.

The Supreme Court in the *Welch* case actually held in wording as follows:

"And when serious problems are created by its public projects, the government is not barred from making a common sense adjustment in the interest of all the public." P. 849 *supra*.

Everything else stated in the *Welch* case is dictum and the Supreme Court in the *Welch* case gave as authority the case of *Brown v. U. S.*, 263 U. S. 87. In that case an important town stood in the way of a necessary improvement by the United States. Three-

fourths of its streets, alleys, parks and buildings, public and private, would have to be abandoned and buildings could not be moved except to the gradually rising ground east of the Snake River. There was a bluff 100 feet high on the other side of the river. The tract of 475 acres selected for the new town site was the only practical place at which the part of the town to be flooded could be moved so as to be united with the quarter of the old town which would be left. The Supreme Court held that it was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one and that the government had authority to take by way of eminent domain the 475 acres for relocation of the town. In that case, which is the authority for the ruling in the *Welch* case, the Court went on to say as follows:

“Our conclusion is not in conflict with that class of cases with which the justices of the supreme judicial court of Massachusetts dealt in *Opinion of Justices*, 204 Mass. 607, 27 L.R.A. (N.S.) 483, 91 N.E. 405. It was there proposed that the city of Boston, in building a street through a crowded part of the city, should be given power to condemn lots abutting on both sides of the proposed street with a view to sale of them, after the improvement was made, for the promotion of the erection of warehouses, mercantile establishments, and other buildings suited to the demands of trade and commerce. *The justices were of the opinion that neither the development of the private commerce of the city nor the incidental profit which might*

inure to the city out of such procedure could constitute a public use authorizing condemnation. The distinction between that case and this is, that here we find that the removal of the town is a necessary step in the public improvement itself, and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation.”

It is thus submitted that the Supreme Court created an exception to the rule in the *Brown* case and again in the *Welch* case; and in the last thirty years TVA has been slowly widening its activities until now they are claiming that they have a right to engage in any activity which in the opinion of the administrative board is for the general welfare of the people of the Tennessee Valley area, having seized upon dictum in the *Welch* case. In the case at bar, the land of the petitioners is not excess land and is not incident to the generation of the electrical power; but, as admitted by TVA, electrical power and flood control are insignificant and the main purpose of their acts is the development of industrial sites and the changing of the area to an industrial area and to make profit from the sale of the land. Rather than the “dog wagging its tail”, if TVA actions are allowed, “the tail will be wagging the dog”.

The Supreme Court recognized in *Brown v. U. S.* that the power of eminent domain “does not extend to the taking of one man’s property to sell it to another” and the *Brown* case was cited with approval in the *Welch* case.

In the *Brown* case, the Supreme Court stated:

“The circumstances of this case are peculiar. An important town stood in the way of a necessary improvement by the United States. Three-quarters of its streets, alleys and parks and of its buildings, public and private, would have to be abandoned. The buildings could not be moved except to the gradually rising ground east of the Snake River. There was a bluff one hundred feet high on the other side of the river. The tract of four hundred and seventy-five acres selected for the new town site was the only practical and available place to which the part of the town to be flooded could be moved so as to be united with the one-quarter of the old town which would be left. American Falls is a large settlement for that sparsely settled country and it was many miles from a town of any size in any direction. It was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one.

“No one would say that a legislative act authorizing a railway company to build a railroad exceeds the constitutional limit by reason of a specific provision that the company may condemn land not only for the right-of-way but also additional land adjacent thereto for use as borrow pits in making fills and embankments, or for the use as spoil banks or dumps for the earth excavated from tunnels and cuts. Such adjacent land would certainly be devoted to the public use for which the railway was being constructed. If so, then the purchase of a town site on which to put the people and buildings of a town that have to be ousted to

make the bed of a reservoir would seem to be equally within the constitutional warrant. The purchase of a site to which the buildings of a town can be moved and salvaged and the dispossessed owners be given lots in exchange for their old ones is a reasonable adaptation of proper means toward the end of the public use to which the reservoir is to be devoted. The transaction is not properly described as the condemnation of the land of one private owner to sell it to another. The incidental fact that, in the substitution and necessary adjustment of the exchanges, a mere residuum of the town-site lots may have to be sold does not change the real nature of what is done, which is that of a mere transfer of the town from one place to another at the expense of the United States. The usual and ordinary method of condemnation of the lots in the old town, and of the streets and alleys as town property, would be ill adapted to the exigency. It would be hard to fix a proper value of homes in a town thus to be destroyed without prospect of their owners' finding homes similarly situated on streets in another part of the same town or in another town near at hand. It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not to be restored in kind. A town is a business center. It is a unit. If three-quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the State, whose subordinate agency of government is the municipality, are injured. *A method of compensation by substitution would*

seem to be the best means of making the parties whole. The power of condemnation is necessary to such a substitution."

TVA attempts here to make synonymous the words "necessity" and "authority". This is an approach which has been evolving in TVA condemnation suits for the last several years. Using the well recognized principle that a property owner cannot question the necessity of the taking as a cloak, TVA now in effect contends its *authority* cannot be questioned. This proposition has begun to receive support by the federal courts in the affirmance in TVA condemnation suits. This is one of such cases.

The question presented by this case is of great significance to property owners and of great importance regarding the extent to which the dictum in the *Welch* case, *supra*, has been extended by the courts and TVA. This court should determine if TVA determines that it is desirable to take private property from hundreds of owners for a purpose which the board determines is for the *general welfare of the people*, does TVA have a right to take the private property by way of eminent domain?

Up to now, with the approval of the Sixth Circuit Court of Appeals, TVA has been allowed to take any private property that the administrative board feels is desirable so long as it is remotely connected with the damming of a stream, and the case at bar is the most flagrant example of this action.

CONCLUSION

Petitioners do not question TVA's authority to construct a dam, even though flood control and generation of electricity are insignificant. However, petitioners do question the right of TVA to condemn any land that the administrative board deems desirable and feels would be in the general welfare of the area, which is the ruling of the United States Sixth Circuit Court of Appeals. This decision is in direct conflict with *Brown v. U. S.*

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. GRANVILLE CLARK
Clark Building
Russellville, Kentucky 42276
Counsel for Petitioners

APPENDIX

No. 75-1495

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA ex rel
 TENNESSEE VALLEY AUTHORITY,
Plaintiff-Appellee,
v.
 TWO TRACTS OF LAND CONTAINING A
 TOTAL OF 146.4 ACRES, ETC., ET AL.,
Defendants-Appellants.

APPEAL from the
 United States Dis-
 trict Court for the
 Eastern District of
 Tennessee.

Decided and Filed April 6, 1976.

Before: PHILLIPS, Chief Judge, and EDWARDS and MIL-
 LER, Circuit Judges.

PHILLIPS, Chief Judge. This is an appeal from the judg-
 ment of District Judge Robert L. Taylor upholding the
 power of the Tennessee Valley Authority to condemn two
 tracts of land for use in the Tellico Dam project in Ten-
 nessee. Also challenged on appeal is the amount of dam-
 ages allowed as just compensation for the taking of the
 land. We affirm.

The condemnation proceeding was filed under the Ten-
 nessee Valley Authority Act of 1933 as amended.¹ Pur-
 suant to Fed. R. Civ. P. 71A(h), Judge Taylor referred
 the issue of compensation to three commissioners, who con-
 ducted a full evidentiary hearing and determined that com-
 pensation should be allowed in the amount of \$59,000.
 Judge Taylor adopted the report of the commission and
 entered judgment accordingly.

¹16 U.S.C. §§ 831-831dd (1970 Supp. III, 1973).

The principal contention on appeal is that the land condemned is not needed for the construction, operation and maintenance of Tellico Dam and Reservoir and that TVA abused its discretion and is acting arbitrarily, capriciously and in bad faith in the condemnation of the land in question. Specifically it is asserted that the land is intended to be used for recreational and industrial purposes and some of it will be resold for such purposes at some future date.

It is well settled that the necessity, expediency, location and extent of taking property for a public purpose are legislative and administrative questions and that the scope of judicial review is extremely narrow. *Bergman v. Parker*, 348 U. S. 26, 35 (1954); *United States ex rel TVA v. Welch*, 327 U. S. 546, 551-52 (1946); *United States v. Agee*, 322 F. 2d 139, 141 (6th Cir. 1963).

It is well established that in eminent domain proceedings the United States is not limited to precisely the amount of property which will be physically occupied by the public. In the construction of a dam and reservoir, as in the present case, the TVA is not restricted to taking only the land which actually will be submerged if additional land is required for a public purpose. *Welch*, 327 U. S. at 354; *Brown v. United States*, 263 U. S. 78, 81 (1923); *Agee*, 372 F. 2d at 143; *United States v. Certain Real Estate lying on the South Side of Board Street*, 217 F. 2d 920, 924 (6th Cir. 1954); *Starr v. Nashville Housing Authority*, 145 F. Supp. 498 (M.D. Tenn. 1956), *aff'd*, 354 U. S. 916 (1957).

The Tellico Dam project has been before this court in previous litigation. Reference is made to our earlier decisions for a description of its scope and purposes. See *Environmental Defense Fund*, 492 F. 2d 466 (1974), *aff'g*, 371 F. Supp. 1004 (E.D. Tenn. 1973); and 468 F. 2d 1164 (6th Cir. 1972), *aff'g*, 339 F. Supp. 806 (E.D. Tenn. 1972).

The record shows that the scope and purposes of the Tellico Dam project was discussed in Congress before the initial appropriation authorizing the project, as well as

afterwards. During the 1966 hearings before the House Appropriations Committee, TVA furnished a statement setting forth in detail the scope and purposes of the project, including plans for resale and development of some of the land to be condemned. The statement contained the following summary:

SHORELINE LANDS

TVA believes the Tellico project will contribute greatly to the industrial development of the area and *proposes to follow a land acquisition pattern which will assure that sites needed for industry are reserved for that purpose. The amount of land acquired by TVA for the project is expected to be about twice the area inundated, as has been the case in most other reservoirs.* However, advance planning will assure a more effective use of the shoreline lands than in the past. Plans for the use of these lands will be developed in full cooperation with State and local officials to insure that sites best suited for industry are not dissipated for less vital purposes and that there are adequate provisions for public and private recreation, homesites, and other purposes.

The plan to acquire key lands for industrial and recreation development and resell them as demand for such property increases reflects the public purpose of the project in meeting the serious need for measures to speed growth in employment and general economic development in this part of eastern Tennessee.

*Proceeds from the sale of lakeshore lands, presently estimated at \$10,900,000, would be returned to the U.S. Treasury as an offset against the cost of the project.*² (Emphasis added.)

²Hearings on Public Works Appropriations for 1967 before a Subcommittee of the House Committee on Appropriations, 89th Cong., 2d Sess., Pt. 2, 761-66 at 765 (1966).

Every year since 1966 Congress has appropriated additional funds for the Tellico project.

Judge Taylor held as follows:

The Court has carefully examined the facts and law before it and concludes that, while defendants are correct in their proposition that TVA's action is in fact subject to judicial review, it cannot say that TVA is presently acting in an arbitrary and capricious manner simply because the property presently being condemned may ultimately be resold to a private party at some future date.

The Court, having sat in previous review of this project, cannot conclude that the industrial development of the region surrounding the Tellico floodline is so remote from the project's purpose as to be designed for profit making purposes alone. See generally, *Environmental Defense Fund v. Tennessee Valley Authority*, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd* 492 F. 2d 466 (6th Cir. 1974). Contrary to plaintiff's argument and his supporting affidavit Congress' object in its acquisition and resale program was founded upon public purpose:

"The plan to acquire key lands for industrial and recreation development and resell them as demand for such property increases reflects the public purpose of the project in meeting the serious need for measures to speed growth in employment in this part of eastern Tennessee."

While defendant argues that industrial growth is not needed in this region, it is not this Court's position to reappraise the wisdom of congressional policy in this regard. "The role of the judiciary in determining whether that power (of eminent domain) is being exer-

cised for public purpose is an extremely narrow one". *Berman, supra*, 348 U. S. at 32. Cf. *United States v. 554 Acres of Land*, 314 F. Supp. 273 (E.D. Tenn. 1969).

The decision of the District Court is supported by the authorities heretofore cited in this opinion. See also *United States ex rel TVA v. Two Tracts of Land*, 456 F. 2d 264 (6th Cir. 1972), *cert. denied*, 409 U. S. 807 (1972); *Illinois Central Railroad Co. v. TVA*, 445 F. 2d 308 (6th Cir. 1971); *Goodpasture v. TVA*, 434 F. 2d 760 (6th Cir. 1970).

Appellants also contend that the award of \$59,000 made by the Commission and approved by the District Court is inadequate. The record shows that at the time of the filing of the declaration of taking, TVA deposited \$43,550 as its estimate of just compensation. TVA's appraisers valued the land at from \$42,000 to \$43,075. The landowners and their witnesses placed valuations on the property from \$79,800 to \$159,120. Thus the judgment is within the range of the evidence.

We hold that the District Court did not commit reversible error in the amount awarded for damages.

All other contentions made by appellants have been considered and found to be without merit.

The judgment of the District Court is affirmed.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

TENNESSEE VALLEY AUTHORITY

v.

ROBERT G. DAVIS, Et Al.

} Civil Action No. 7428

ORDER

This is a condemnation proceeding under the Tennessee Valley Authority Act of 1933, 16 U.S.C. Sec. 831, 831dd, in which T.V.A. seeks to condemn defendants' property for use in the construction, operation, and maintenance of the Tellico Dam and Reservoir project.

Defendants contend in their answer that (1) the property which TVA seeks to condemn will not in fact be used for the Dam and Reservoir project, (2) that the taking by T.V.A. is unconstitutional and (3) T.V.A. has abused its discretion and "is acting arbitrarily, capriciously, and in bad faith in said proposed taking." The case is presently before the Court on plaintiff's motion for judgment on the pleadings or for summary judgment. It is the opinion of the Court that defendants' contentions with respect to the propriety of this taking are without foundation either in law or fact. See generally, *Environmental Defense Fund v. Tennessee Valley Authority*, 371 F. Supp. 1044 (E.D. Tenn. 1973), aff'd 492 F. 2d 466, 468 (6th Cir. 1974) (multi-purpose project, including shoreline development). See also, *United States v. Welch*, 327 U. S. 546, 553-54 (1946)

(the authority may condemn "all property (it) deems necessary"); *Berman v. Parker*, 348 U. S. 26, 33 (1954); *Tennessee Valley Authority v. Kinzer*, 142 F. 2d 833 (6th Cir. 1944); *Goodpasture v. Tennessee Valley Authority*, 434 F. 2d 760, 763 (6th Cir. 1970); *Illinois Central R.R. v. Tennessee Valley Authority*, 445 F. 2d 308 (6th Cir. 1971).

Accordingly, it is ORDERED that plaintiff's motion be, and the same hereby is, granted.

Enter:

/s/ Robert Taylor

United States District Judge

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

UNITED STATES OF AMERICA Upon
the Relation and for the Use
of the TENNESSEE VALLEY AU-
THORITY

Plaintiff

v.

TWO TRACTS OF LAND CONTAINING A
TOTAL OF 146.4 ACRES, MORE OR
LESS, IN LOUDON COUNTY, TEN-
NESSEE

ROBERT G. DAVIS
VIVA LEE DAVIS, His Wife,
THE FEDERAL LAND BANK OF LOUIS-
VILLE, a Corporation
E. V. LANDERS, Trustee

Defendants

No. 7428

COMPLAINT

I

This is an action of a civil nature brought by the United States of America upon the relation and for the use of the Tennessee Valley Authority for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

II

The authority for the taking is the Tennessee Valley Authority Act of 1933, 48 Stat. 58, as amended, 16 U.S.C. Sections 831-831dd (1964; Supp. V, 1965-69).

III

The use for which the property is taken is the construction, operation, and maintenance of Tellico Dam and Reservoir.

IV

The interest to be acquired in the property is an estate in fee simple.

V

The property so to be taken is described in Exhibit A which is attached hereto and made a part hereof.

VI

The persons known to the plaintiff to have or claim an interest in the property are:

Robert G. Davis and Viva Lee Davis, his wife, own the fee simple interest in that portion of said property designated in Exhibit A as Tract No. TELR-304 as tenants by the entirety by virtue of a deed recorded in Deed Book 49, page 180, in the office of the Register of Loudon County, Tennessee. Robert G. Davis owns the fee simple interest in that portion of said property designated in Exhibit A as Tract No. TELR-1002 by virtue of intestate succession from his father, J. R. Davis, and Viva Lee Davis may have or claim an interest therein by virtue of her marital status.

The Federal Land Bank of Louisville holds a lien on that portion of the property designated as Tract No. TELR-304 to secure the payment of an indebtedness in the original amount of Fifteen Thousand Eight Hundred Dollars (\$15,800), as evidenced by a trust deed recorded in the aforesaid Register's office in Trust Deed Book 92, page 326. E. V. Landers is named trustee in said trust deed.

County taxes for 1971 are a lien on said property.

VII

A declaration of taking is being filed contemporaneously herewith.

WHEREFORE, the plaintiff demands that:

1. An order be issued putting the Tennessee Valley Authority as agent of the United States of America into immediate possession of the property condemned.

2. Just compensation for the property taken be ascertained by a jury (unless the Court in its discretion orders that the issue of compensation shall be determined by a commission of three persons appointed by it pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure).

3. A judgment be entered confirming the vesting of title to the interests sought to be condemned in the United States of America by virtue of the declaration of taking filed herewith.

4. The plaintiff have such other relief as may be lawful and proper.

/s/ Robert H. Marquis
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee

/s/ Thomas A. Pederson
Solicitor

/s/ Beverly S. Burbage

/s/ L. G. Morehous

Attorneys for Plaintiff

No. 75-1730

Supreme Court, U. S.
FILED

JUL 24 1976

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

TWO TRACTS OF LAND CONTAINING A TOTAL OF 146.4
ACRES, MORE OR LESS, ET AL., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

HERBERT S. SANGER, JR.,
General Counsel,
Tennessee Valley Authority,
Knoxville, Tennessee 37902.

JUSTIN M. SCHWAMM,
Assistant General Counsel,

BEVERLY S. BURBAGE,
Chief Condemnation Attorney,
Tennessee Valley Authority,
Knoxville, Tennessee 37902.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1730

TWO TRACTS OF LAND CONTAINING A TOTAL OF 146.4
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TENNESSEE VALLEY AUTHORITY

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The two opinions of the district court are reported at 387 F. Supp. 319. The opinion of the court of appeals (Pet. App. 15-19) is reported at 532 F. 2d 1083.

JURISDICTION

The judgment of the court of appeals was entered April 6, 1976. The petition for a writ of certiorari was filed on May 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in connection with its Tellico Dam and Reservoir project, the Tennessee Valley Authority may acquire petitioners' property by condemnation.

STATEMENT

The Tennessee Valley Authority (T.V.A.) instituted this condemnation action under the Tennessee Valley Authority Act of 1933, 48 Stat. 58, as amended, 16 U.S.C. 831-831dd, to acquire two tracts of land for T.V.A.'s Tellico Dam and Reservoir project on the Little Tennessee River in east Tennessee. A substantial portion of the larger tract will be inundated; the remainder of the larger tract and the smaller tract, which also borders the reservoir, will be used for shoreline protection and development. The purposes of the Tellico project have been accurately described by the court of appeals in prior unrelated litigation (*Environmental Defense Fund v. Tennessee Valley Authority*, 492 F. 2d 466, 468 (C.A. 6)):

TVA will ultimately acquire thirty-eight thousand acres for development of the project. Sixteen thousand, five hundred acres will be inundated upon completion of the reservoir; the remaining acreage will be developed for industrial, commercial, residential, and recreational purposes. The project plan also contemplates the creation of a new city, Timberlake, with a population of fifty thousand persons.

* * * * *

The Tellico Project is a multi-purpose water resource and regional development project. The reservoir and connecting canal with Fort Loudoun reservoir will serve to develop navigation, flood control, and electric power generation. Other direct benefits claimed by the project are recreational development, fish and wildlife use, water supply, shoreline development, and redevelopment. The project was first authorized by Congress on October 15, 1966.

Petitioners¹ challenged the government's authority to acquire the property at issue here, asserting that the lands were not condemned for use in connection with the Tellico Dam and Reservoir, but were acquired for resale to private industries, a purpose, they contended, not authorized by the T.V.A. Act. In rejecting this contention, the district court held (387 F. Supp. at 321):

The Court has carefully examined the facts and law before it and concludes that * * * it cannot say that TVA is presently acting in an arbitrary and capricious manner simply because the property presently being condemned may ultimately be resold to a private party at some future date.

The Court * * * cannot conclude that the industrial development of the region surrounding the Tellico floodline is so remote from the project's purpose as to be designed for profit making purposes alone. * * * Contrary to defendant's argument and his supporting affidavit Congress' object in its acquisition and resale program was founded upon public purpose:

"The plan to acquire key lands for industrial and recreation development and resell them as demand for such property increases reflects the

¹Although the Federal Land Bank of Louisville, and E. V. Landers, trustee, are listed as petitioners, they were not parties to the appeal below, which was taken solely by "Robert G. Davis and wife, Viva Lee Davis" through their present counsel. The Federal Land Bank was a defendant because it held a lien on one of the condemned tracts under a trust deed naming E. V. Landers trustee (Pet. App. 25). The answer filed in the district court on behalf of those defendants by their attorney, Charles L. Hardin of Louisville, Kentucky, denied neither the government's authority to take the land nor the necessity for the taking.

public purpose of the project in meeting the serious need for measures to speed growth in employment in this part of eastern Tennessee."

While defendant argues that industrial growth is not needed in this region, it is not this Court's position to reappraise the wisdom of congressional policy in this regard. "The role of the judiciary in determining whether that power [of eminent domain] is being exercised for public purpose is an extremely narrow one." *Berman* [v. *Parker*, 348 U.S. 26, 32] * * *. Cf. *United States v. 544 Acres of Land*, 314 F. Supp. 273 (E.D. Tenn. 1969).

The court of appeals affirmed (Pet. App. 15-19), relying upon the portion of the opinion of the district court just quoted (*id.* at 18-19).

ARGUMENT

Petitioners contend (Pet. 12) that the T.V.A. does not have authority to acquire by condemnation the property at issue in this case. In *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 553-554, this Court recognized the broad responsibilities placed on T.V.A. by the Act. These responsibilities include more than building isolated dams; they include responsibility for the "agricultural and industrial development of the whole Tennessee Valley" (327 U.S. at 553).²

²As the Court stated (327 U.S. at 553):

All of the Authority's actions in these respects were to be directed towards "development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this Act . . . all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas . . ."

Moreover, the Court also recognized T.V.A.'s authority under the Act to acquire by condemnation any property it deemed necessary to fulfill these responsibilities.³

With respect to the Tellico project, at issue here, the use of the land to be acquired was fully described during the original appropriation hearing. Hearings on Public Works Appropriations for 1967 before a Subcommittee of the House Committee on Appropriations, 89th Cong., 2d Sess., pt. 2, 754-766 (1966) ("1966 Hearings"). See also Hearings on Public Works Appropriations for 1966 before a Subcommittee of the House Committee on Appropriations, 89th Cong., 1st Sess., pt. 3, 14-32, 145-151 (1965); Hearings on H.R. 9220 before a Subcommittee of the Senate Committee on Appropriations, 89th Cong., 1st Sess., pt. 4, 43-61 (1965). During the 1966 Hearings (at 765) T.V.A. stated that the Tellico project would contribute greatly to the industrial development of the area and proposed a plan for land acquisition that would assure the availability of sites needed for that development. T.V.A. expressed the belief that advanced planning was necessary to assure more effective

³The Court referred to the specific statutory authority of T.V.A. to acquire property by condemnation (327 U.S. at 553-554):

To discharge its responsibilities the T.V.A. was granted "such powers as may be necessary or appropriate" for their exercise. Section 4(h) of the Act gives the T.V.A. the very broad power to "exercise the right of eminent domain . . ." Section 4(i) of the Act empowers the Authority to condemn certain specified types of property and concludes by referring to "all property that it [the Authority] deems necessary for carrying out the purposes of this Act . . ." To make clear beyond any doubt the T.V.A.'s broad power, Congress in §25 authorized the Authority to file proceedings, such as the ones before us, "for the acquisition by condemnation of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act."

use of shoreline lands than in the past, when sites best suited for industry had been used for other purposes. *Ibid.* At the same time T.V.A. sought to assure that there would be adequate provisions for public and private recreation, homesites, and other purposes. *Ibid.*

In short, as was made clear in the 1966 Hearings (*ibid.*):

The plan to acquire key lands for industrial and recreation development and resell them as demand for such property increases reflects the public purpose of the project in meeting the serious need for measures to speed growth in employment and general economic development in this part of eastern Tennessee.

Congress appropriated funds for the Tellico project in fiscal year 1967 and each year thereafter, notwithstanding objections to the project similar to those petitioners make here. See, e.g., Hearings on H.R. 17787 before a Subcommittee of the Senate Committee on Appropriations, 89th Cong., 2d Sess., pt. 4, 62-80 (1966); Hearings on H.R. 18127 before a Subcommittee of the Senate Committee on Appropriations, 91st Cong., 2d Sess., pt. 5, 380-384 (1970). As both courts below held, the acquisition of the property at issue here was contemplated by Congress and is fully within T.V.A.'s authority under the Act. See *United States ex rel. Tennessee Valley Authority v. Welch*, *supra*.

Petitioners nevertheless contend (Pet. 7-12) that under *Brown v. United States*, 263 U.S. 78, T.V.A. may not accomplish its purpose by condemning property ultimately intended for resale to private buyers. But *Brown* does not stand for the proposition for which it is cited. Petitioners' quotation from the *Brown* opinion (see Pet. 9) to the effect that eminent domain "does not extend

to the taking of one man's property to sell it to another"—is taken from the Court's recitation of counsel's argument (263 U.S. at 81), which the Court rejected by upholding the condemnation of property that was to be resold to other private parties. Whatever doubts remained after *Brown* concerning the power of the federal government to condemn land for resale to private parties were resolved in *Berman v. Parker*, 348 U.S. 26, a case petitioners do not cite. There the Court upheld the taking of privately owned commercial property in the District of Columbia in connection with a slum clearance and redevelopment project in which the condemned property was to be used as part of an integrated plan for new homes, schools, churches, parks, streets, and shopping centers. The Court held (348 U.S. at 33):

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. * * * Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.

Under this analysis, the decisions below are correct. The Tellico project serves clear and valid public purposes well within the scope of T.V.A.'s responsibility under the Act, as Congress has repeatedly recognized in the course of its appropriation of funds. The acquisition of petitioners' land is thus valid; T.V.A. is not prohibited from effectuating its plan in the manner it has chosen.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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